U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

Issue date: 24Jul2001

CASE NO:. 2000-LHC-742

OWCP NO:. 03-26682

In the matter of:

THOMAS VOYTOVICH
Claimant

v.

C & C MARINE MAINTENANCE CO.
Employer

and

GAB ROBINS NORTH AMERICAN, INC.
Carrier

DECISION AND ORDER - AWARDING BENEFITS
AND GRANTING 8(f) RELIEF

This case arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*., hereinafter referred to as the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702. Claimant filed his claim on September 2, 1999. Claimant seeks permanent total disability benefits for injuries sustained on May 9, 1997 while employed as a barge repair foreman by C&C Marine Maintenance Company, hereinafter referred to as "C&C Marine" or "Employer." On December 21, 1999, the Director referred this case to the Office of Administrative Law Judges for a hearing.

A formal hearing was held before the undersigned on September 21, 2000, in Pittsburgh, Pennsylvania, at which time the parties were given a full and fair opportunity to present evidence and argument. Claimant's Exhibits (CX) 1-68 and Employer's Exhibits (EX) 1-38 were admitted to the record without objection. The record remained open post hearing for the submission of additional evidence and closing briefs. On December 18, 2000, this office received Claimant 's Closing Statement and Memorandum of Law and Director's Post-Hearing Brief Opposing Employer's Request

for 8(f) Relief. On December 19, 2000 the Employer submitted Employer's Post-Hearing Memorandum.

STIPULATIONS

The parties have stipulated to the following facts. Accordingly, I find that:

1. The Act (33 U.S.C. §901 *et seq*.) applies to this claim.

2. Claimant was employed by C&C Marine on May 12, 1997.

3. An Employer's First Report of Injury or Occupational Illness was filed on June 6, 1997.

4. Claimant reported the accident to C&C Marine on May 12, 1997.

5. Claimant returned to work on August 9, 1999 and worked for two days.

6. Claimant has not worked since August 10, 1999.

7. Claimant received temporary total disability payments in the amount of $396.00 per week for 115 weeks, commencing on May 22, 1997, and extending through August 8, 1999 for a total of $45,709.72.

8. C&C Marine terminated all weekly disability payments, not including medical payments, pursuant to a Notice of Final Payment or Suspension of Compensation Payments issued on August 25, 1999, based on the report of Jack Smith, M.D., dated April 27, 1998, and the reports of Robert F. Durning, M.D., dated June 22, and July 13, 1999, who both concluded that Claimant could perform his pre-injury job of barge repair foreman as outlined in the Job Description Analysis.

9. Claimant's average weekly wage is $594.00, and Claimant's compensation rate (AWW x 2/3) is $396.00.

ISSUES

1. Whether claimant is permanently and totally disabled from the job of barge repair foreman because of work-related injuries, which occurred on May 9, 1997?

2. Whether Employer should pay Claimant's medical expenses pursuant to Section 7 of the Act?

3. Whether Employer is entitled to relief under Section 8(f) of the Act?

SUMMARY OF EVIDENCE

HEARING TESTIMONY

THOMAS VOYTOVICH

Claimant testified that he went to school until 9th grade and then went to work in a scrap yard with his father. After about five years, he went to work demolition at Loria Brothers; then for Penn Birmingham Bolt as a laborer; then to Hillman Barge, where he repaired barges for about ten years. (Tr 26, 27). Claimant testified that he then went to C&C Marine where he repaired boats and barges. (Tr 28). He started as a barge repairman and was promoted to barge repair foreman, but worked as a working foreman. (Tr 39-41).

Claimant testified that in 1987, he was in a accident while car pooling to work. Claimant stated that his head hit the back windshield of pickup truck and went through the window when the truck was struck from behind by a coal truck. Claimant was treated at Brownsville Hospital. Claimant testified that he went back to work next day. (Tr 30, 31).

Claimant testified that he had also been injured in a second auto accident shortly thereafter while driving home from work with his co-workers, Francis Zuker, and Paul Danka. (Tr 29). Claimant stated that he hit his head against the back window when the truck was rear ended. Claimant testified that his head hurt, but that he didn't miss work. (Tr 30).

Claimant also testified that he suffered a heart attack and underwent a quadruple bypass. (Tr 35, 36). Claimant stated that he was off work for four months and went back to work on April 1, 1996. (Tr. 37). Claimant stated that his chest was sore after the surgery. (Tr 90). Claimant also stated that when he returned to work, he was told by his supervisor not to overexert himself. (Tr 91).

Claimant testified that he was injured twice on Friday, May 9, 1997. (Tr 42). He stated that he was carrying a steel plate weighing approximately 20 or 30 pounds, which he balanced on his helmet, when he slipped while stepping over a chain. (Tr 43-46). He stated that as he was bringing his right foot over the chain, his left foot kicked out from under him which caused him to fall backwards towards the chains and the rail. (Tr 46). He landed on his back in a pile of scrap. (Tr 51). He proceeded to go back to the break press and pick up another plate. (Tr 52). This time, he tripped over the chain and fell onto his chest on a welding rod box. Claimant testified that his co-worker, Jimmy Berlingeri, witnessed the fall, and helped him to get back up. Claimant testified that he felt a burning sensation in his chest, and that when he fell his arms cranked backwards, hurting his side and shoulder. (Tr 55, 56).

Claimant testified that he discussed both of his falls with Jimmy Berlingeri, who was present during the second fall. (Tr 58). Claimant also stated that he spoke to his supervisor, Greg Bucci, about his accidents that night, but that Greg Bucci asked him if they could wait to fill out an accident report until Monday. (Tr 59). Claimant then stated that he went home, went to bed, and then went to work the next day until noon. (Tr 60).

Claimant testified that on Monday morning, May 12, 1997, he felt a sharp stabbing pain in his lower back. (Tr 61). He stated that he called his co-worker, Francis Zuker to tell him that he did not need a ride to work, and asked Mr. Zuker to tell Greg Bucci that he could not make it to work. (Tr 62). Claimant testified that he went to see his doctor, Dr. Prakorb on Tuesday or Wednesday and that Dr. Prakorb sent him to Brownsville Hospital for x-rays. (Tr 62).

Claimant testified that he tried to return to work the following Monday, but was unable to work and had to go home. He also testified that his supervisor, Greg Bucci, was not there, so that he was not able to fill out an accident report. (Tr 64-65). Claimant testified that three to four weeks after the May 9, 1997 accidents his wife drove him to C&C Marine to fill out an accident report with Mr. Bucci. (Tr 88). He stated that Mr. Bucci instructed him that he should only fill out one report for the first fall on May 9, 1997. (Tr 88).

Claimant stated that he received a letter from C&C Marine in May of 1998 indicating that a doctor had completed an affidavit of recovery (EX 16) and that he was able to return to work at his previous position. However, Claimant testified that his doctor, Dr. Wilhelm recommended that he not return. (Tr 108).

Claimant testified that he returned to work on August 9 and August 10, 1999 after he received a second letter from the employer (EX 15) instructing him to go back to work. (Tr 73). He stated that although he was told by Greg Bucci to take it easy, he was in too much pain to continue working. Claimant stated that after the second day of work, he went to see his chiropractor who told him not to return to work. (Tr 79).

Claimant testified that he is in to much pain to return to work. He testified that he suffers from shoulder, back, chest, and groin pain and feels pressure in his head like he is still carrying something on his head. (Tr 63). He also stated that he is unable to lift his arms up over his head or sideways and cannot sleep through the night due to pain. (Tr 67, 72). Claimant also testified that he gets dizzy and has memory problems. He stated that he has accidents and is forgetful. (Tr 70). Claimant stated that sitting, standing, and walking bothers him, and that he can only drive short distances. (Tr 121).

MARLENE VOYTOVICH

Claimant's wife, Marlene Voytovich testified that she married Claimant in 1960. She testified that he has always been a hard worker and does not like to go to doctors. She testified that she did

not notice any changes in her husband after his bypass surgery except that he was sore. She also stated that prior to the May 9, 1997 accident he was "husky" and had broad shoulders.

Claimant's wife stated that since the accident occurred, she has noticed that Claimant is irritable and cannot sleep. She has noticed that he has lost strength, his shoulders slope and he is in constant pain. She has also noticed that her husband is forgetful and will forget things are on the stove, forget to close doors, and forget where he is going when he is driving.

Mrs. Voytovich also testified that a few days after the May 9, 1997 accident she took a picture (CX 38) of a large bruise on Claimant's back. (Tr 137-145).

FRANCIS MICHAEL ZUKER

Francis Zuker testified on behalf of the employer. Mr. Zuker was employed by C&C Marine for over thirteen years and has worked as a working foreman for about twelve years. He testified that as a working foreman, he assigns the jobs, and gives the men a hand if they need help. He also stated that he is not required to help and that it is in his discretion how much physical labor to do. (Tr 153).

Mr. Zuker stated that knew Claimant prior to their employment with C&C Marine. Mr Zuker also testified that he car pooled to work at C&C Marine with Claimant and was involved in two car accidents with Claimant. (Tr 155-158).

Mr. Zuker testified that after Claimant's bypass surgery, Claimant continually complained about his chest hurting and complained that he thought he was going to die. (Tr 161). Mr. Zuker also testified that when Claimant came back to work, his duties were lessened. (Tr. 162).

Mr. Zuker testified that he was not at work when Claimant fell. He stated that Claimant told him about it the next day at work, when Claimant said he fell and hurt his chest. Mr. Zuker stated that Claimant only mentioned that he fell once. (Tr 163).

JAMES ROBERT BERLINGERI

Mr. Berlingeri testified at the hearing on behalf of the employer. He testified that he had been employed by C&C Marine for approximately 10 years as laborer and knew Claimant as a foreman. Mr. Berlingeri recalled that Claimant's job was directing the work force and joining in the work at his own discretion. (Tr 171). Mr. Berlingeri stated that before Claimant's heart attack, Claimant had stomach pain for at least a month, and that after heart surgery he complained about his chest being sore. Mr. Berlingeri also stated that Claimant's job stayed the same after his heart attack, but that Claimant was encouraged to take it easy. (Tr 174).

Mr. Berlingeri stated that he saw Claimant fall once on May 9, 1997. (Tr 179). He testified

that he was not asked to write a report on the accident and was testifying on recollection of the event which occurred over three years ago. (Tr 193).

He testified that the fall that he witnessed happened towards evening at dusk, but that it was not raining. (Tr 176). He stated that the crew was working on a tow boat repairing the side of the boat, which required welding steel plates to the boat. (Tr 176). Mr. Berlingeri stated that when the crew needed another piece of steel, Claimant was carrying it on his right shoulder. (Tr 183). He stated that to get to the boat, they had to step over two chains. Mr. Berlingeri recalled that Claimant made it over the first chain, but when he went to go over a second chain, his foot got caught on the second chain and he fell and threw the steel and landed on his hands and knees. (Tr 184-186). Mr. Berlingeri testified that Claimant said that his chest was sore. Mr. Berlingeri stated that he walked the claimant up to the shed and told him to take it easy. Mr. Berlingeri testified that the claimant didn't mention a previous fall and Mr. Berlingeri did not see a previous fall. (Tr 188).

Mr. Berlingeri also testified that he has seen people carrying steel plates on their shoulder and that he has never seen anybody carrying a steel plate on top of their head. (Tr 178).

GREGORY JOSEPH BUCCI

Mr. Bucci, who was Claimant's direct supervisor at C&C Marine, also testified at the hearing on Employer's behalf. Mr. Bucci has worked for C&C Marine for approximately 20 years and is presently the general foreman. (Tr 197).

Mr. Bucci testified that after Claimant's bypass surgery, Claimant continued working as a foreman. (Tr 202). Mr. Bucci also testified that after surgery, Claimant complained of chest pain fairly regularly, and that Claimant lost weight, and did not seem like he wanted to be at work. (Tr 203-205).

Mr. Bucci testified that he was not at work the Friday night of Claimant's fall and did not hear about Claimant's fall until Monday at work. (Tr 206-207). Mr. Bucci stated that Claimant told him that he fell once. (Tr 208). After he was told of the fall, Mr. Bucci made an appointment for Claimant to see an orthopaedic surgeon, Dr. Tranovich, who reported back to Mr. Bucci that Claimant needed physical therapy. After the appointment, Mr. Bucci tried to contact Claimant by phone, but after no one answered the phone for two months, Mr. Bucci went to see him at home. (Tr 209-210). Mr. Bucci testified that Claimant told him that he was feeling worse and that he suggested that Claimant should see another doctor. (Tr 211-212).

Mr. Bucci also testified about Claimant's return to work in August of 1999. Mr. Bucci testified that he told Claimant to take it easy. Mr. Bucci testified that he told him he could sit, stand, and walk, as he chose. (Tr 219). Mr. Bucci stated that after Claimant's third day back at work he received a note from Dr. Wilhelm (CX 19) informing him that Claimant could not return to work due to an aggravation of his injury. (Tr 223).

Mr. Bucci also testified that he helped in the preparation of a job description for the job of working foreman (EX 5) which he signed and dated 3/3/98. (Tr 215). This job description analysis was prepared by Employer, because General Adjustment Bureau, the third party administrator of claims, wanted a job analysis done to submit to treating physicians to determine whether Claimant could perform his pre-injury job. (Tr 241).

DONALD A. GRIMM

Mr. Grimm, the president of C&C Marine, testified that although his office is not on site, he visited the site often and talked to Claimant and observed his work frequently. (Tr 234). Mr. Grimm stated that Claimant was an excellent employee before the accident. (Tr 235).

Mr. Grimm stated that after Claimant's bypass surgery, he was shocked by how much weight Claimant lost and Claimant's frailty. Mr. Grimm also stated that he told Claimant to take it easy after the surgery and that he wanted Claimant to continue to work for C&C Marine for his expertise in barge and vessel repair. (Tr 236).

Mr. Grimm testified that Mr. Bucci called and notified him about Claimant's fall and that after the fall the company immediately began voluntary payment of benefits through the third party administrator. (Tr 237). Mr. Grimm testified that he spoke to Claimant by phone after the accident and that Claimant said that he was dizzy, and hurt all over, and said that he thought he was dying. Mr. Grimm testified that he tried to encourage Claimant to be active. (Tr 239).

Mr. Grimm also testified that after receiving a "Physician's Affidavit of Recovery" from Dr. Jack Smith, dated April 27, 1998 (EX 1) which stated that Claimant was capable of performing the duties required as a foreman at C&C Marine, the company sent the first of two letters to Claimant (EX 16) dated May 12, 1998, indicating that he should return to work. Mr. Grimm testified that the company then received a letter from Claimant's attorney's office dated May 26, 1998, (EX 37) which stated that Claimant could not return to work. (Tr 242).

Mr. Grimm testified that C&C Marine continued to pay Benefits to Claimant until a second letter was issued requesting that Claimant return to work. Mr. Grimm testified that C&C Marine had requested a second evaluation of Claimant by Dr. Durning, and that based upon reports by Dr. Durning, (EX 2-4) Mr. Grimm wrote another letter (EX 15) to Claimant dated July 30, 1999 indicating that his job available for him and that he was able to do the job based upon the medical reports. (Tr 244). Mr. Grimm also stated that Claimant's job is still available for Claimant to return. (Tr 245).

CLAIMANTS EXHIBITS

The first claimant's exhibit is the Employer's First Report of Injury or Occupational Illness, dated June 6, 1997, that reports that Claimant suffered an injury on May 9, 1997 at 9:30pm, which falls

under the Act. The injury is listed as a strained back. The first treating physician was listed as Dr.Wilhelm, who was chosen by the claimant. (CX 1).

The record contains the third party administrator's report, dated June 10, 1997, which reports that the claimant stated that he was working with two employees, Paul Bakoski and Jimmy Burlinger, on the afternoon shift which started at 3:00 PM. They were reconstructing pieces for the side of boat, the "Elizabeth M." which required that sheet metal pieces be carried to site of reconstruction. At around 9:30 the claimant was carrying a sheet of metal on his head that was 18" X 22" X 3/8" and weighed around 30 pounds and he slipped and fell onto his back while trying to step over a chain. He was shaken but not enough to stop working. He continued to work and about a half hour later, while walking in the same area, carrying another sheet of metal over his head, he stepped across the chain and his foot snagged on to it and he tripped and fell forward and his chest struck a welding rod box. He got up and continued to work to the end of the shift. He did not report the accident to his supervisor. He went home and reported to work the next day. Although his back was sore he did not seek medical attention over that weekend. On Monday he was unable to report to work. He called another foreman, Frances Zuker, and asked him to report the injury to his supervisor. (CX 4).

Additionally, the claimant submitted pictures of the work site at CX 36 and 37; a Report of Confidential Social Security Benefit Information, dated 5/25/00, which shows that he was awarded disability with an onset date of May 9, 1997 at CX 43; and compensation records at CX 2.

Claimant also submitted various articles dealing with chronic pain and pain management, soft tissue traumas, myofascial pain, fibromyalgia and brain injuries. (CX 49-65).

CLAIMANT'S MEDICAL EXHIBITS

Thomas J. Romano, M.D., Ph.D., FACP

Dr. Romano was deposed on September 14, 2000, in connection with this claim. (CX 66 & 67). Dr. Romano is board certified in internal medicine, rheumatology, and certified as Diplomate, American Academy of Pain Management Dr. Romano has also had many medical articles published and presents extensive credentials as an expert in dealing with pain management and soft tissue trauma causing myofascial pain syndrome and fibromyalgia. (CX 8). Articles by Dr. Romano have been submitted for the record at CX 52, 55, 56, 65.

In his deposition, Dr. Romano stated that his diagnoses for the claimant is called a multi-regional myofascial pain syndrome which severely affects muscles in three of the four quadrants of the claimant's body. (CX 66 pg. 31). Dr. Romano explained the physiology of this condition. (CX 66 pg 16-47). Dr. Romano was questioned on Employer's Exhibits 29, 30, 31 and 32, which are articles critical of the diagnoses of fibromyalgia and myofascial pain syndrome, and dismissed the articles as non-scientific and unreliable. (CX 66 pg 47-75). On cross examination, Dr. Romano reiterated his opinion that

although some in the medical community question of the validity of the fibromyalgia and myofascial pain syndrome diagnoses, his research, his experience in treating patients, and recent scientific and medical journal articles by specialists in the field, support a finding that these are legitimate diagnoses. (CX 66 pg 127-174).

Dr. Romano testified that many of his patients with fibromyalgia have problems with memory, concentration, personality changes, headaches, difficulty sleeping, myoclonus, and central nervous type symptoms. (CX 66 pg 82). Dr. Romano also explained his the use of brain SPECT scan (Single Photon Emission Computerized Tomography) as a method for a more sensitive evaluation of Claimant's injury. (CX 66 pg 108 -111). Dr. Romano explained Claimant Exhibits 56 and 57, articles addressing the use of brain SPECT scanning as the test of choice for evaluating patients with mild traumatic brain injuries. (CX 66 pg 83). Dr. Romano testified that the claimant's brain scan was abnormal. (CX 66 pg 91).

Dr Romano stated in his May 2, 2000 report that before examining the claimant, he had a chance to review the medical records of Drs. Prakorb, Wilhelm, Donohue, Baraff, Stokes, Papincak, Pineda, Tranovich, Smith, Durning, Heppner, as well as records from Barnesvill General Hospital. Dr. Romano's report states that the claimant suffers from a multi-regional myofascial pain syndrome which Dr. Romano believes will not respond to treatment. (CX 5).

In the May 2, 2000 report, Dr. Romano also noted his concern that the claimant has a traumatic brain injury considering noted personality changes, difficulty sleeping, change in sexual behavior and problems with memory and concentration. Dr. Romano's report states that his concern of a brain injury correlates with the results of blood testing performed in the examination which revealed a suboptimal IGF-1 level, which is measure of metabolite of growth hormone. Dr Romano stated that patients with brain injuries often have adult growth hormone deficiency. Furthermore, Dr. Romano reported that the claimant's brain SPECT scan, which was performed and evaluated by Dr. Srini Govindan, a neurologist, on May 12, 2000, was found by Dr. Srini Govindan to be abnormal which also correlates with the claimant's complaints of memory loss, fatigue and emotional state. (See CX 9, 10). Claimant was found to have areas of "perfusion asymmetry" which is a blood flow imbalance in the brain, which in Dr. Romano's opinion was caused by traumatic brain injury that resulted from Claimant's May 9, 1997 accident. Dr. Romano reported that it is his professional opinion that Claimant's first fall caused the traumatic brain injury which then contributed to the second fall.

Dr. Romano's reports state that as a result of the May 7, 1997 injuries the claimant is permanently impaired, and judging that he is almost 60 years old, has a ninth year education, has a 35 year history of performing heavy work, the claimant is totally and permanently disabled from his former occupation as a result of the severe multi-regional myofascial pain syndrome and the traumatic brain injury the claimant sustained as a result of the May 9, 1997 work injuries. Dr. Romano also stated that although in his opinion the claimant had not reached MMI, he would never be able to return to his job as a longshoreman. (CX 5 - 7).

Dr. Romano also testified in the September 14, 2000 deposition that a brain SPECT is either normal or abnormal, but doesn't reveal causation. He also stated that it is possible that a SPECT scan performed on the claimant following the car accidents may have been abnormal, but also may have healed. (CX 66 pg 181).

Ravi Kant, M.D.

Claimant was examined by Dr. Kant on June 9, 2000 for neuropsychiatric evaluation. Dr. Kant diagnosed Claimant's symptoms as secondary to myofascial pain syndrome and post concussion syndrome. Dr. Kant stated that there were atrophic changes noted in the CT scan of the brain and an abnormal showing of reduced cerebral blood flow in the SPECT scan. Dr. Kant stated that atrophic changes are not expected at Claimant's age and that it is well documented that concussions can cause cerebral atrophy and alteration of the cerebral blood flow as noted on the scans. Dr. Kant stated that his opinion is that Claimant will not be able to return to work and is permanently disabled from engaging in any gainful employment because of problems with chronic pain syndrome and the persistent post concussion syndrome symptoms caused by the accident of May 9, 1997. Dr. Kant also stated that he did not believe that Claimant would be able to recover any further from his symptoms. (CX 44).

The record also contains a letter from Dr. Kant to Claimant's attorney, dated August 28, 2000, which states that Claimant is currently undergoing treatment under research protocol at the University of Pittsburgh for treatment of cognitive deficits after head injury. (CX 46). The record also contains Dr. Kant's Curriculum Vita at CX 45.

Sue R. Beers, PhD

On July 7, 2000, Dr. Beers conducted an evaluation of Claimant's cognitive functioning as part of the University of Pittsburgh Brain Trauma Research Center. In Dr. Beers report from that evaluation, she stated:

> In summary, [Claimant] exhibited a depressed level of neuropsychological function across most test domains. A brief physiological inventory suggests he is also experiencing significant level of depression. [Claimant] voiced complaints of chronic pain, which may account - at least to a degree, for his lower than expected cognitive profile. Referral to a pain clinic is recommended. (CX 48).

George A. Wilhelm, D.C.

Claimant first went to Dr. Wilhelm for chiropractic treatment shortly after he injured his head, neck and back, when he was in a car accident which occurred on October 31, 1987. Dr. Wilhelm diagnosed the claimant's injury as a cervical spine sprain, a thoracic strain, and post-concussion syndrome. Claimant was treated by Dr. Wilhelm for this injury from November 12, 1987 through

March 24, 1988. (CX 32).

Claimant returned to Dr. Wilhelm for treatment on March 29, 1988 after he was injured in a second car accident. Claimant reported that he was suffering from neck pain, headaches, numbness in his head, dizziness, and knee pain. Claimant was treated by Dr. Wilhelm for this injury from March 29, 1989 through December 20, 1989. (CX 33).

Dr. Wilhelm began treatment with Claimant again on May 19, 1997. Dr. Wilhelm's report, dated May 22, 2000 states that as a direct result of the falls at work on May 9, 1997, Claimant suffered a moderate sprain to the lumbosacral spine with associated left lower extremity radiculitis. In addition Claimant suffered a contusion to his chest. Dr. Wilhelm ordered CT scans and x-rays (See CX 26, 27, 28) which the report states showed that Claimant demonstrated a hematoma over the left paralumbar musculature which was documented by CT scan of the lumbar spine. This hematoma was located at the left L4/L5 level. Dr. Wilhelm also ordered evaluation by a cardiovascular specialist to determine if there was a crossover from musculoskeletal to visceral pain generation which to his understanding revealed that Claimant's problems are of a musculoskeletal basis. (CX 11).

Dr. Wilhelm's report states that Claimant's treatment has consisted of various physiological therapeutic modalities, chiropractic manipulative techniques, soft tissue techniques, and some exercise, but that due to the complexity of Claimant's injuries Claimant has been unable to return to pre-injury status and continues to suffer signs and symptoms related to his May 9, 1997 injuries. Dr. Wilhelm also reports that he referred Claimant for pain control measures by Dr. Larry Papincak at the Uniontown Pain Management Services and to Dr. Baraff for a neurological evaluation. Finally, Dr. Wilhelm states that the prognosis for Claimant is guarded to poor and that in his opinion, within a reasonable degree of chiropractic certainty, that Claimant remains disabled from his time of injury as a working supervisor. (CX 11). The record also contains records from Claimant's treatment by Dr. Wilhelm from May 1, 1997 to August 12, 1999 at CX 17 and from August 13, 1999 to August 25, 2000 at CX 39; Dr. Wilhelm's Curriculum Vita at CX 12; and a listing of Dr. Wilhelm's unpaid charges shown at CX 30.

In an addendum to the May 22, 2000 report, dated May 26, 2000, Dr Wilhelm stated that it is his opinion within a reasonable degree of chiropractic certainty that Claimant suffered a brain injury or concussion as well as a contusion to his chest and lumbar spine injury when he fell twice on May 9, 1997. Dr. Wilhelm also stated that Claimant continues to suffer from chronic myofascial pain related to these injuries and is disabled. (CX 40).

Dr. Larry J. Papincak, M.D.

Dr. Wilhelm referred the claimant for treatment with the Uniontown Pain Management Services where Claimant had an initial consultation with Dr. Papincak on December10, 1997. Dr. Papincak reviewed Claimant's medical records and performed an examination. Dr. Papincak's initial impression was that Claimant was suffering from chronic lumbosacral sprain.

Dr. Papincak completed a Physical Capacities Evaluation on June 18, 1998, and based on a job description submitted by the employer determined that Claimant would not be able to return to work as a barge repair foreman. Dr. Papincak indicated that the claimant could walk, sit and stand for a maximum of one hour during an eight hour day, could lift or carry a maximum of 10 pounds occasionally, could not bend, squat, crawl, or climb and could only reach above shoulder or push and pull occasionally. Further, Dr. Papincak indicated that the claimant could not work full or part time and assigned the claimant a disability rating of 90%. Dr. Papincak also indicated that the claimant had not reached MMI, but did not specify a target date for improvement.

Dr. Papincak's office notes which cover visits from April 8, 1998 until April 7, 2000, reveal complaints of persistent lower back and chest wall pain with some relief obtained by prescription medication treatment.

Dr. Papincak's notes also addressed a Functional Capacity Test (FCE) wherein Claimant was found to be able to perform light duty. Dr. Papincak reported in his December 3, 1998 office note that he agreed with the FCE regarding Claimant's general physical capabilities, but was of the opinion that Claimant was not able to do full-time work at that time due to significant flare of pain with any type of activity and heavy requirement for medication to control pain. Dr. Papincak also reviewed letters from Dr. Smith concerning inconsistencies in Claimant's FCEs. Dr. Papincak reported in his office notes dated July 8, 1999, that he did not find the FCEs to be conflicting as it is not necessary for them all to be consistent in order to determine clinically the patient's status. (CX 29).

The record contains Dr. Papincak's Curriculum Vita at CX 13 and itemized statements for Claimant's treatment on January 1, 2000 and March 9, 2000 at CX 31.

M. Tranovich, M.D.

The employer referred the claimant to Dr. Tranovich who examined Claimant on June 3, 1997. Dr. Tranovich's office notes from the examination reported that:

> There is a mild diminishment in his left quadriceps jerk and no localizing other signs. On Inspection of his lumbar spine it shows hematoma about the lumbosacral junction extending out into both ilial areas. He is directly tender to this area. He has marked splining of this area on any range of motion movement including flexion extension and rotation as well as lateral bending which is limited approximately 50%. There is marked spasm through the musculature. X-rays reviewed from the chiropractor show some degree of arthritic change with mild osteoporosis and changes in the posterior elements. No sign of fracture or dislocation.

Dr.Tranovich's office notes from the examination also state that his impression of Claimant's condition was a direct contusion lumbar spine with marked paravertebral muscle spasm and some exacerbation of his underlying mild degenerative changes possibly causing him some radicular

component. Dr. Tranovich prescribed a program consisting of nonsteriodal anti-inflammatories, local modalities heat, and physiotherapy for local modalities to include exercises. (CX 14).

At the claimant's initial physical therapy session on June 11, 1997, Lisa Joyce, P.T., examined Claimant and reported that Claimant exhibited fair to good rehabilitation potential. Claimant did not show up for two later scheduled appointments with the physical therapist or continue with the physical therapy recommended by Dr. Tranovich. (CX 20).

Bryan Curry Donohue, M.S., F.A.C.C., P.C.

The record contains records from Claimant's cardiologist regarding his bypass surgery. Dr. Donohue initially examined Claimant on December 4, 1995. At this time Claimant reported that he had not had any prior chest discomfort. On December 6, 1995 Claimant underwent coronary artery bypass. The notes from that procedure indicate that there were no complications. Follow-up correspondence from June 27, 1997, also indicates that Claimant did not suffer from any later complications and had recovered normally. (EX 24).

Claimant's counsel, by letter to Dr. Donohue, dated September 9, 1999, inquired as to the potential relationship between the fall on May 9, 1997 and a vascular consequence. Dr. Donohue, responded by letter dated September 29, 1999, that he had last seen Claimant on January 1, 1996 as a follow up to his heart surgery and that Claimant had last been in the office for an examination on June 26, 1997. Dr. Donohue stated that in the latter examination Claimant reported a recent blunt trauma to the chest and that the office notes reported that the chest wall was stable, referring in particular to the sternal incision. Dr. Donohue also stated that there would be no reason whatever to associate Claimant's May 9, 1997 fall with any vascular sequelae. (CX 21, 22, 23).

Richard L. Heppner, M.D., F.A.C.C.

Dr. Heppner, a board certified cardiologist, conducted an "independent medical evaluation" (IME) of Claimant on October 19, 1999 at the employer's request with regard to chest pain. Dr. Heppner referred to Claimant's cardiac history dating back to December 1995 when Claimant underwent coronary bypass surgery but stated that the discomfort complained of was arising from the chest wall which is not the type of pain which would be associated with any specific cardiac abnormality. Instead, Dr. Heppner stated that "his symptoms are clearly not related to cardiac ischemia or any other pathologic process involving the heart. Since his pains seem to be directly related to his chest injury, I would primarily ascribe the pains to the contusions associated with his fall. However, some patients have chronic pain following bypass surgery due to the incisions or adhesions."

Dr. Heppner found that Claimant's chest symptoms were of a musculoskeletal variety, which seem to have been triggered by his fall. However, Dr. Heppner also stated that the fall and his surgery both contributed to his symptoms but that relative contributions of the fall and heart surgery to his

symptoms are difficult to define. Finally, Dr Heppner stated that Claimant's heart condition was a pre-existing disability which might have influenced an employer not to hire or to fire him because of increased mortality and morbidity risks. (CX 24).

Robert Baraff, M.D.

Dr. Baraff, a specialist in neurology, first evaluated Claimant on May 9, 1988, for evaluation of injuries sustained on March 29, 1988, when Claimant was in a car accident. Dr. Baraff's reports from that evaluation state that a complete neurological examination revealed an alert, oriented gentleman in minimal distress. The report also states that:

> [Claimant] sat comfortably for the interview. He dressed and undressed without assistance for the examination. EOMI, PERL. Discs flat. No nystagmus. No visual field cut. Cranial nerves intact. No focal motor deficit. DDTR's 1+. Plantar responses flexor bilaterally. He can stand on his heels or toes. He can do a deep knee bend. No atrophy or fasciculations. Sensation normal except for patchy areas of hyesthesia to pin prick and light touch over his right hand. Tinel's sign negative. Romberg negative. Cerebellum intact. Gait within normal limits. No cranial, orbital, or carotid bruits. No scoliosis or kyphosis. Neck supple with mild decreased range of motion on lateral rotation associated with discomfort. Cervical flexion and extension normal. Mild cervical paravertebral muscle spasm. Minimal thoracic and lumbar paravertebral muscle spasm. Flexion at the waist accomplished to 80 degrees associated with low back pain. Extension and lateral bending at the waist normal. Straight leg raise negative. Mental status within normal limits.

Dr. Baraff's report listed his diagnoses as cerebral concussion with post concussion syndrom, cervical strain with right cervical radiculopathy, and thoracic/lumbosacral paravertebral muscle strain, all resulting from the March 29, 1988 accident. (CX 34).

Dr. Baraff also evaluated Claimant on July 29, 1997 and August 26, 1997 regarding Claimant's May 5, 1997 work-related injuries. In his report from those evaluations, Dr. Baraff stated that a complete neurological examination revealed an alert, oriented gentleman in minimal distress. The findings in the 1997 report parallel the 1988 report except that claimant's 1988 report stated "sensation normal except for patchy areas of hypesthesia to pin prick and light though over his right hand," and the 1997 report stated "sensation normal." Additionally, the claimant's gait was no longer within normal limits but slow and slightly antalgic on the left side; he had slight impairment of pin prick and light touch along the lateral surface of his left foot including his fourth and fifth toes; he no longer had cervical or thoracic paravertebral muscle spasm; and his flexion at the waist was accomplished to 60 degrees with back and left leg pain, whereas in 1988 it was reported at 80 degrees with low back pain.

Dr. Baraff's report listed his impression as cerebral concussion with post concussion syndrome, lumbosacral strain with lumbosacral radiculopathy, all resulting from his May 9, 1997 accident. Dr.

Baraff's report also states that a CT scan of Claimant's brain performed on July 31, 1997 by V. A. Alcantara, M.D., was within normal limits. (CX 25, 26).

EMPLOYER'S EXHIBITS

Employer submitted a denial of benefits notice from the Social Security Administration dated September 26, 1997 and a denial on reconsideration dated December 3, 1997. (EX 12, 13). Employer's Exhibits 15 and 16, which are letters from Mr. Grimm to the Claimant have been summarized above.

The Employer submitted a list of all physicians ordering SPECT scans from Ohio Valley Medical Center from 1993 through 1998. (EX 33). This list showed only the names of Drs. Romano and Govindan. The Employer also submitted articles dealing with chronic pain and pain management, soft tissue traumas, myofascial pain, fibromyalgia, and brain injuries, (EX 30-32, 34-36).

The Employer submitted Claimant's application for 8(f) relief and the District Director's letter dated December 6, 1999 denying Section 8(f) relief. (EX 19, 20).

EMPLOYER'S MEDICAL EXHIBITS

The medical records and reports from Drs. Heppner (EX 6); Wilhelm (EX 7, 8); Baraff (EX 10, 11); Tranovich (EX 17); Donohue (EX 24); and Romano (EX28) have been summarized above.

Dr. Jack D. Smith, M.D.

Dr. Smith examined Claimant on April 27, 1998 in connection with a Job Description/Analysis prepared by Deborah Duke, M.ED., N.C.C., C.C.M. The Job Description/Analysis which was compiled through on site job analysis, employer interviews, and dictionary of occupational titles described the job as:

> Employees including general laborers, welders and filters are responsible for maintaining physical condition of water-bound vessels. Barge Repair Foreman is responsible assigning work, supervising and coordinating activities of ten workers engaged in production and repair. May assist in hands-on work to repair surface defects requiring cutting steel plates, reconstructing preceptor sides of boats and barges with use of machinery. May set up work and direct/assist with maintenance duties. Inspects and feels surface of workpiece to determine extent of defect. Oversees operation. Schedules employees. Processes reports, logs and paperwork. Welding is performed by subordinates. Delegates job functions - optional hands on assist. (EX 5)

In his report dated April 27, 1998, Dr. Smith stated that Claimant's complaints were extremely

vague including chest pain all over, low back pain that travels into his left leg, difficulty with bending and cannot rise on his tip-toes and cannot lift his shoulders along with complaints of dizziness. Dr. Smith stated that on the basis of the examination he found that Claimant's complaints were subjective, vague, and in a number of instances, strongly suggest some degree of symptom magnification. Further, Dr. Smith stated that he did not find any evidence of residual disability and that based upon the job description of a barge repair foreman, and the fact that Claimant could delegate certain duties as necessary even allowing for his subjective complaints, Claimant should be able to perform the job. In light of this examination, Dr. Smith signed a Physician's Affidavit of Recovery stating that Claimant had fully recovered from the low back and chest injury which occurred on May 9, 1997 and could return to work without limitation. (EX 1).

Dr. Smith also signed the Job Description/Analysis on April 27, 1998, and indicated by checkmark that Claimant could perform the job as described on a full time basis. (EX 5).

Robert P. Durning, M.D.

Dr. Durning is a board certified orthopaedic surgeon. (EX 25). Dr. Durning examined Claimant on June 15, 1999. Dr. Durning also reviewed medical records including x-rays and material from Drs. Tranovich, Allen, Papincak, Smith, Wilhelm, and Brownsville General Hospital, and a job description of the claimant's barge repair foreman position. Dr. Durning summarized his findings in a letter dated November 16, 1999, stating that in his opinion, the shoulder, low back, and left hip problems described by Claimant combine to cause an impairment equal to 26% of the whole person as based on the AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, Fourth Edition. That conclusion was derived by combining 10% right shoulder with 10% left shoulder with 5% DRE Lumbosacral Category II (low back) with 4% left hip motion impairment. However, Dr. Durning also stated that neither of Claimant's shoulder impairments and none of his shoulder symptoms are related in any way to the May 9, 1997 work injury. Therefore in the absence of shoulder impairment, Dr. Durning found that Claimant has an impairment equal to 9% of the whole person due to this low back and left hip.

Additionally, in Dr. Durning's opinion, the 5% impairment of the whole person due to the low back impairment is not due solely to the effects of the May 9, 1997 injury. In Dr. Durning's opinion, pre-existing congenital stenosis and pre-existing degenerative changes in his low back are greater contributors to his low back symptoms than any effect of a soft tissue injury on May 9, 1997. Dr. Durning also states that the claimant sustained no structural damage to his back, but that his history is compatible with a soft tissue problem such as a sprain or strain as diagnosed by Drs. Wilhelm and Baraff, and that strains or sprains generally resolve or become medically stable within three months from the time of onset. Dr. Durning reported that in his opinion, the claimant's diagnosis, reported physical findings, and primary treatment had become stable by early August 1997 and no further improvement occurred in his low back condition after early August 1997. Finally, Dr. Durning reported that it is his opinion that the claimant is able to perform the job duties of Barge Repair Foreman, as

described in the Job Description/Analysis for Barge Repair Foreman. (EX 2-4).

Dr. Durning was deposed on May 26, 2000. In the deposition, Dr. Durning stated that at the June 15, 1999 examination, he observed that the examination was dominated by pain behavior and that Claimant moved cautiously and was tender to touch, especially in the shoulder, low back, and left groin. Dr. Durning stated that he thought that some of the findings reflected pain behavior rather than true pathology. (EX 14 pg. 26). Dr. Durning also stated that he found no abnormalities in Claimant's chest (EX 14 pg. 21) and stated that Claimant's chest discomfort could be a residual effect of the bypass surgery. (EX 14 pg. 27). Dr. Durning also stated that although there is a chest condition present, there is no reference to such condition in the AMA guide and there is not a basis for calculating impairment because of that condition. (EX 14 pg. 37).

Dr. Durning stated that although he did not think that Claimant's shoulders were normal, he did not think that the shoulder symptoms were related to the 1997 injury. He stated that he based this opinion on the fact that Claimant did not receive treatment for his shoulder condition from Drs. Wilhelm, Baraff, nor from any of the physicians that have treated or evaluated him for the May 9, 1997 injury. (EX 14 pg 36-41).

Dr. Durning testified that neither the physical findings nor the diagnostic studies indicate that any lasting structural damage or permanent material change such as broken or damaged bones, or torn muscles or tendons, or swelling, bruising or atrophy occurred to Claimant's body as a result of the May 1997 accident. (EX 14 pg 38). Dr. Durning also testified that in reviewing Dr. Wilhelm's treatment records he found that Claimant had complained of head, neck, and shoulder pain after the two car accidents which occurred in 1988. Claimant also complained of headaches, and distorted vision, and numbness in his head. (EX 14 pg 45). Dr. Durning testified that in reviewing Dr. Baraff's neurological examination records from the 1988 car accidents, he found that Dr. Baraff's impression after the May 9, 1997 work injury was the same as far as the cerebral concussion with post concussion syndrome, and essentially the same in regard to the low back. (EX 14 pg. 46-47).

Dr. Durning stated that he believed that Claimant had the physical ability to meet all the physical requirements of his job as described in the Job Description/Analysis. He testified that Claimant's musculoskeletal system was adequate and appropriately conditioned for that work, but that he did not believe that Claimant could have performed this job without pain. (EX 14 pg. 40).

Dr. Durning stated that it is his opinion that Claimant has spinal stenosis and degenerative changes that pre-existed the 1997 work injury, and that the low back problem was caused in part from the pre-existing condition, and some from the 1997 injury. (EX 14 pg. 36). Dr. Durning also stated that the pe-existing factors were apparent in the medical records that were in effect with respect to Claimant prior to the 1997 injury. (EX 14 pg 42). Dr. Durning stated that in his opinion, claimant had abnormalities of the musculoskeletal system, specifically degenerative changes in his spine and his knee that pre-existed the May 1997 events that undoubtedly made him less than normal, but not disabled

from his customary job duties. (EX 14 pg. 55-56).

Richard Kasdan, M.D.

Dr. Kasdan, who is board certified in psychiatry and neurology, reviewed Claimant's extensive medical records and examined Claimant on July 14, 2000 for the purpose of an "Independent Medical Examination" in which he determined that Claimant could return to his foreman position.

Dr. Kasdan's report states that Claimant's past medical history reveals prior problems with chest and shoulder pain as shown in office notes of Dr. Prakorb, his primary care physician. In addition, Dr. Kasdan notes that in the records of Dr. Wilhelm, there are numerous allusions to severe shoulder pain, leg pain, and lumbar pain that followed two separate motor vehicle accidents.

Dr. Kasdan reported that on exam he found that Claimant had a reduced range of neck motion; an inability to place his arms in front of him; would not place his arms over head, reason unknown; no shoulder spasm; and no range of back motion.

Dr. Kasdan noted that he found no evidence of any cognitive injury from the May 9, 1997 fall in the medical records or from the examination. In reference to the CT scan of 1997, and SPECT scan of 2000, Dr. Kasdan stated that the atrophy revealed by the CT scan is minimal and consistent with Claimant's age, and that the asymmetric blood flow revealed by the SPECT scan is meaningless. Dr. Kasdan reported that he has rarely seen a normal SPECT scan and that a paper by the American Academy of Neurology completely de-emphasizes the use of the SPECT scan because of its enormous excessive sensitivity and lack of specificity.

Finally, Dr. Kasdan reported that in his opinion, Claimant bruised his body when he fell in May of 1997 but suffered no structural problems or permanent injury. Dr. Kasdan also stated that Claimant does have a lot a regional pain, but that no diagnosis can be made that this is in any way related to his fall since he had a lot of regional pain prior to the fall as documented by the numerous medical records. (EX 26-27).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

While the record clearly establishes that Claimant sustained a work-related injury on May 9, 1997; that Employer had timely notice; that the employer authorized appropriate medical treatment; that certain benefits have been paid under the Act; and that Claimant timely filed for benefits, questions remain as to whether Claimant suffered two separate falls on May 9, 1997; the extent of the Claimant's injuries occurring on May 9, 1997; and whether Claimant is able to return to his job as a working foreman for the employer.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. *Gardner v. Bath Iron Works Corporation,* 11 BRBS 556 (1979), *aff'd sub nom., Gardner v. Director, OWCP,* 640 F.2d 1385 (1st Cir. 1981); *Preziosi v. Controlled Industries,* 22 JBRBS 468 (1989); *Janusziewicz v. Sun Shipbuilding and Dry Dock Company,* 22 BRBS 376 (1989); (Decision and Order on Remand); *Johnson v. Ingalls Shipbuilding,* 22 BRBS160 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash,* 782 f.2d 513 (5th Cir. 1986); *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BBS 142 (1989); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

The claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish his prima facie case. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland,* 23 BRBS 157 (1990); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495, (1982). It is well-settled that the judge, in arriving at a decision in the claim, is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain trimmers Ass'n,* 390 U.S. 459 (1968); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20, 22 (1989).

Once a prima facie case is established, a presumption is created under Section 20(a) of the Act that the employee's injury arose out of his or her employment. 33 U.S.C. § 920(a). Once the presumption is invoked, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and working conditions. The employer must produce specific and comprehensive evidence that the claimant's condition was not caused, aggravated, or contributed to by the work-related accident. *Hampton v. Bethlehem Steel Corp.,* 24 BRBS141 (1990). *Ranks v. Bath Iron Works Corp,* 22 BRBS 301 (1989); *Brown v. Jacksonville Shipyards, Inc.,* 893 F.2d 294, 23 BRBS 22 (CRT)(11th cir. 1990). If the Administrative Law Judge finds that the presumption is rebutted, it no longer controls and he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Devine v. Atlantic Container Lines, G.T.E.*, 25 BRBS 15 (1991).

According to Claimant's testimony, while he was working the night shift on May 9, 1997, it was raining and near dusk when he fell twice. He testified that while attempting to carry a piece of steel, balanced on his helmet, he slipped and fell over a chain. (Tr 42). Claimant testified that he fell backwards, but did not remember what happened after he started to fall, but believed he struck the chain because his shoulder was sore the next morning. (Tr 50-51). Claimant continued to work, and fell a second time. This fall was witnessed by Mr. Berlingeri, who was walking behind Claimant when he fell while again carrying a piece of steel. (Tr 52-56). Claimant testified that he fell forward, dropping the steel, and struck his chest on a welding box and cranked his arms and shoulders forward. Claimant testified that he then finished his shift and drove home. (Tr. 56-60). Claimant's wife also testified that a few days after the May 9, 1997 accident she took a picture (CX 38) of a large bruise on the claimant's back, which Claimant attributed to his first fall backward. (Tr 137-145)

The employer, however, presents a differing set of events from May 9, 1997, and claims that Claimant was only involved in one minor accident on May 9, 1997, which "can in no way be the cause of the numerous maladies as to which the Claimant alleges he now suffers." Employer contends that previous events caused Claimant's numerous maladies. Employer also contends that Claimant is exaggerating his symptoms and is able to return to his pre-injury work. (Employer Brief).

The employer's witness, James Berlingeri, testified that at the time of Claimant's injuries it was getting dark, but it was not raining. (Tr 176). Mr. Berlingeri testified that although he was working near the site of Claimant's first alleged fall, he did not see or hear Claimant fall. (Tr 182).

Mr. Berlingeri further testified that he was present for the Claimant's second fall. (Tr 183). He testified that Claimant carried a steel plate back down towards the boat on his right shoulder with one hand, and not on his helmet as Claimant had testified. (Tr 184). Mr. Berlingeri testified that Claimant did not appear disoriented or injured and that Claimant had not mentioned that he had fallen earlier. (Tr 186-190). Mr. Berlingeri testified that Claimant did fall once while stepping over a chain. He testified that Claimant did not hit his head. (Tr 186-189).

Mr. Zuker, who was not at work on May 9, 1997, testified for the employer that Claimant told him while working on May 10, 1997, that he fell over some chains and landed on his chest. (Tr 152, 163). Mr. Bucci also testified that Claimant told him that he had fallen once. (Tr 62).

Claimant and Employer agree on the occurrence of the second fall forward which was witnessed by Mr. Berlingeri. There are discrepancies surrounding the second fall, however, such as whether or not it was raining, and whether or not the claimant was carrying the steel plate on his shoulder, over his head, or on his head. These discrepancies however are not material to the outcome of this claim. Claimant has presented credible testimony and persuasive medical evidence establishing that he fell twice on May 9, 1997, injuring his back, shoulders, and chest causing him to suffer from chronic pain. Also, the recorded telephone statement taken by the Third Party Administrator supports

Claimant's credibility regarding the existence of two falls. (CX 4).

Claimant testified that since the falls, he experiences shoulder pain that radiates into his chest and down to his elbows. (Tr 67). He testified that he crosses his arms to relieve the shoulder pain. (Tr 68). Mr. Berlingeri, testified that after he witnessed the claimant throw the steel plate while falling forward onto his hands and knees, Claimant told him that his chest was sore. (Tr 183-189). Mr. Zuker also testified that Claimant told him that he had fallen and landed on his chest. (Tr 152, 163). Claimant was examined by his cardiologist, Dr. Donohue, after the fall. (Tr 71). Dr. Donohue stated that he could not associate this fall with any vascular sequella. (CX 22). The Employer's expert, Dr. Heppner also stated that Claimant's chest pain was musculoskeletal in nature and was triggered by his fall. (CX 24). The Employer has not presented persuasive medical evidence showing that Claimant did not suffer a work-related chest injury. Also, the Employer has not presented persuasive medical evidence showing that Claimant did not suffer work-related shoulder or back injuries on May 9, 1997.

An issue remains as to whether Claimant has established the existence of a brain injury suffered on May 9, 1997. Because Claimant has not presented persuasive evidence that he hit his head in his work-related falls, and further has not presented persuasive medical evidence that he suffered brain trauma on May 9, 1997, I find that the claimant has failed to establish the existence of a work related brain injury by a preponderance of the evidence.

Claimant's Claim for Compensation (EX 38), dated May 26, 1998, and the Employer's First Report of Injury (CX 1), dated June 6, 1997, do not mention a claim for head trauma. Also, Claimant testified that he did not remember whether or not he hit his head when he fell. (Tr 51). Claimant presented the report of Dr. Baraff, who diagnosed Claimant as suffering from post-concussion syndrome as a result of the work accident. However, as Employer notes, Dr. Baraff's diagnosis and Claimant's symptoms parallel the diagnosis rendered by Dr. Baraff after Claimant sought treatment for his injuries suffered in the earlier car accidents. (CX 34). Employer also presents a report by Dr. During which reveals that Claimant complained of pain in both shoulders, his chest, and his lower back. Claimant, however, denied experiencing headaches. (EX 2). In later assessing the alleged brain injury, Dr. Kasdan, who is board certified in psychiatry and neurology, concluded that there was no head injury or loss of consciousness resulting from the May 9, 1997 falls. (EX 26, 40, 41). Claimant, however, presents the report of Dr. Kant, a neurologist, who reported that Claimant's SPECT scan is abnormal, and diagnosed Claimant as suffering from Persistent Post Concussion Syndrome with multiple head injuries. (CX 44). Dr. Romano stated that the results of the scan correlate with Claimant's complaints of memory loss, fatigue, and emotional state. However, Dr. Romano also testified that many of his patients suffering from fibromyalgia have problems with concentration, personality changes, headaches, and difficulty sleeping. Additionally, he testified that a SPECT scan does not reveal causation of brain traumas and that it is possible that a scan performed on Claimant following the car accidents may also have been abnormal, but also may have healed. (CX 66 pg. 181).

Accordingly after careful review of the evidence of record, I find that Claimant has met his

burden of proving the existence of a work-related injury or harm to his shoulder, chest and back causing him to suffer from chronic pain and that the employer has not presented substantial evidence which establishes rebuttal of the presumption under 20(a) that the injuries arouse of out Claimant's employment.

Nature and Extent of Disability

Section 2(10) of the Act defines "disability" as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. 22 U.S.C. §902(10). In order for a claimant to receive disability benefits, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 110 (1991); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 26 (9th Cir. 1975). Consideration must be given to a claimant's age education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970).

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing. *New Orleans Stevedore v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979).

On the basis of the totality of the record, I find and conclude that Claimant has established that he cannot return to work at C&C Marine. This is based on the reports of Claimant's physicians, Drs. Romano, Wilhelm, and Papincak. whose opinions are persuasive, logical, in depth, and consistent with the facts. Dr. Romano, who presents excellent credentials in rheumatology and pain management, stated in a report dated May 2, 2000 that Claimant's injuries, "have resulted in permanent impairment and judging that ths patient is almost 58 years of age, has a 9th year education, has a 35 year history of performing heavy work, it is my professional opinion that [Claimant] is totally and permanently disabled from his former occupation as a result of his work related injuries." (CX 5). In addition, since the time of injury on May 9, 1997, Claimant's treating chiropractor, Dr. Wilhelm, has repeatedly signed disability slips for Claimant stating that he is totally disabled and advised to refrain from work and in a report dated May 22, 2000, stated that Claimant remained disabled from his job with C&C Marine. (CX 11, 18, 19). Finally, Dr. Papincak, Claimant's treating physician for pain management indicated in a "physical capacities evaluation" dated December 10, 1997, that Claimant would not be able to return to work at C&C Marine. Dr. Papincak has continued to treat Claimant since the time of the injury and has not noted any improvement in Claimant's condition from that time. (CX 29). The burden thus rests

upon Employer to demonstrate the existence of suitable alternative employment in the area. If the Employer does not carry the burden, Claimant is entitled to a finding of total disability. *American Stevedore, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

In this case, Employer has not submitted credible and persuasive evidence as to the availability of suitable alternative employment. Employer contends that Claimant's previous position has been and continues to be available and that he can perform that job. Employer submitted the reports of Drs. Smith, Durning, and Kasdan, which conclude that Claimant is able to perform the duties of barge repair foreman as outlined in Ms. Duke's Job Description/Analysis. However, Drs. Smith, Durning and Kasdan have each examined the Claimant only once. In addition, although these doctor's have concluded that Claimant could return to his pre-injury position, Dr. Kasdan reported that Claimant continues to suffer from pain that may or may not be related to his falls (EX 26,27), and Dr. Durning reported that he did not believe that Claimant could perform the job without pain. (EX 14 pg. 40). Dr. Smith concluded that Claimant's complaints of pain were subjective, vague, and in a number of instances, strongly suggested some degree of symptom magnification. (EX 1). Claimant testified that he is in too much pain to return to his job at C&C Marine. Claimant testified that he attempted to return to work for two days in August of 1999, but that after the second day of work he was in too much pain to continue working. (Tr 73, 79). In addition, Claimant's chiropractor, Dr. Wilhelm and Claimant's pain management specialist, Dr. Papincak, have concluded that Claimant can not return to work due to chronic pain related to the May 19, 1997 falls. (CX 11, 29).

Claimant's injury is permanent. A permanent disability is one which has continued for a lengthy period of time and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985); *Mason v. Bender Welding and Machine Co.*, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

Claimant contends that he attained MMI on May 9, 1997, the date he sustained the injuries. In support Claimant states he was determined to be permanently disabled as of May 9, 1997, by the Social Security Administration. (See CX 43). Claimant also states that although his physicians do not expressly state that he has reached MMI, they have opined that his condition appears permanent and have only suggested possible pain mitigation treatments. (Claimant's brief).

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Manson v. Bender Welding & Mach.*

Co., 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994). If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. John J. McMullen & Assoc.*, 19 BRBS 243, 245 (1986).

Although Claimant's physicians do not expressly state that he has reached MMI, they have opined that his condition appears permanent and have only suggested possible pain mitigation for treatment. (See CX 5, 11, 29 & 44). On May 15, 1998, Dr. Wilhelm, Claimant's treating chiropractor, signed a disability certificate stating that Claimant was totally incapacitated at that time and would remain so until further notice. (CX 18). On August 10, 1999, Dr. Wilhelm signed a disability certificate which stated that claimant was to refrain from work until further notice. (CX 19). It is not until May 22, 2000, that Dr. Wilhelm reports that there is little likelihood that Claimant's condition would improve. In a report dated May 22, 2000, Dr. Wilhelm stated that due to the complexity of Claimant's injuries, Claimant has been unable to return to pre-injury status and continues to suffer signs and symptoms related to his May 9, 1997 injuries. Additionally, at that time Dr. Wilhelm reported that the prognosis for the claimant is guarded to poor and that Claimant remained disabled. (CX 11).

I find that Claimant reached maximum medical improvement on May 22, 2000. As of that date more than three years after the date of injury, the medical evidence shows that no further improvement is anticipated. On the aforementioned date, Claimant's treating chiropractor, Dr. Wilhelm reported that the prognosis for the claimant was guarded to poor and that Claimant remained disabled. I find Dr. Wilhelm's prognosis to be persuasive and supported by the medical evidence of record. Dr. Wilhelm has been treating Claimant since the time of the May 9, 1997 injury. Dr. Wilhelm also has treated Claimant for prior injures. In addition, Dr. Wilhelm took an active role in addressing all of Claimant's complaints by referring Claimant for CT scans and x-rays as well as to see experts in order to further diagnose and treat Claimant's injuries beyond those within his chiropractic care. Dr.Wilhelm referred Claimant to see Dr. Donohue, Claimant's cardiologist, to address the pathology of Claimant's continuing chest pain (CX 21, 22, 23); Dr. Baraff, a specialist in neurology, for a complete neurological examination (CX 34); Dr. Romano, a rheumatologist, who stated in his May 2, 2000 report that Claimant suffers from a multi-regional myofascial pain syndrome affecting muscles in three of the four quadrants of Claimant's body which Dr. Romano opined will not respond to treatment (CX 5); and Dr. Papincak, a specialist in pain management (CX 29). Accordingly, I find that Claimant was temporarily and totally disabled from May 9, 1997 through May 22, 2000. Further, I find that Claimant is entitled to permanent total disability benefits beginning on May 22, 2000, and continuing.

Medical Expense

An employer found liable for the payment of compensation is, pursuant to Section 7(a) of the

Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Services, Inc*., 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn .v General Dynamics Corp.*, 21 BRBS 219, 22 (1988); *Bourbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Company*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & gulf Stevedores*, 16 BRBS 228 (1984). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b) is well settled. *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978). Accordingly, I find that Claimant is entitled to reimbursement for past medical bills not paid as well as present and future medical benefits for his work-related injuries.

Average Weekly Wage

An award of compensation benefits is determined in reference to Claimant's AWW at the time of the injury. 33 U.S.C. §910. The parties have stipulated to an average weekly wage of $594.00 and a compensation rate of $396.00.

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury, and (3) which combined with the subsequent injury to produce or increase the employee's permanent total disability, a disability greater than that resulting from the first injury alone. *Lawson v. Suwanee Fruit and Steamship Co.*, 336 U.S. 198 (1949); *Director, OWCP v. Cargill, Inc*., 709 F.2d 616 (9th Cir. 1983); *Director, OWCP v. Sun Shipbuilding & Dry Dock Co.*, 600 F.2d 440 (3rd Cir. 1979); *Dugan v. Todd Shipyards*, 22 BRBS 42(1989). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. *Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); *Kooley v. Marine Industries Northwest*, 22 BRBS 142, 147 (1989); *Benoit v. General Dynamics Corp*., 6 BRBS 762 (1977).

Employer argues that although it submits that Claimant is not disabled from returning to his job, and that his May 9, 1997 accident did not cause him any physical disability, it is entitled to special fund relief if the Claimant is found to have sustained a disability related to May 9, 1997. In support, Employer states that Claimant has numerous pre-existing permanent partial disabilities which pre-date May 9, 1997, including back problems, quadruple bypass surgery followed by chest pain, and head traumas which were manifest to Employer. Employer also states that the cumulative effect of all these pre-existing conditions has materially and substantially increased Claimant's current symptoms.

(Employer's Brief pg. 25-27).

The Director, however, argues that Employer in this case is not entitled to special fund relief because it cannot demonstrate the third element required for special fund relief: that the alleged pre-existing permanent partial disability combined with Claimant's May 9, 1997 injury to increase the Employer's liability. (Director's Brief pg. 3).

It is undisputed that Claimant suffered from pre-existing back pain; congenital stenosis and degenerative changes in his low back; head traumas; and quadruple bypass surgery followed by chest pain and weight loss, which were all well documented and therefore manifest to employer.

The employer need not have actual knowledge of the pre-existing condition. Instead, the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it. *Dillingham Corp. V. Massey*, 505 F.2d 1126 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish that the employer was aware of the pre-existing condition. *Director v. Universal Terminal & Stevedoring Corp*., 575 F.2d 452 (3d Cir. 1978); *Delinski v. Brandt Airflex Corp*., 9 BRBS 206 (1978). A disability will be found to be manifest if it is objectively determinable from medical records kept by a hospital or treating physician. *Falcone v. General Dynamics Corp.*, 16 BRBS 202, 203 (1984). It is undisputed that Claimant's pre-exiting conditions were manifest to the employer.

In addition, these pre-existing conditions constitute a pre-existing permanent partial disability under Section 8(f) of the Act, which has been defined as:

> [E]conomic disability under §8(c)(21) or one of the scheduled losses specified in §8(c)(1)-(20), but is not limited to those cases alone. Disability under §8(f) is necessarily of sufficient breadth to encompass those cases wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability. *C&P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 512, 6 BRBS 399 (D.C. Cir. 1977).

Claimant's condition, prior to his final injuries on May 9, 1997, was clearly the condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. This is evidenced by his ongoing treatment for these injuries and conditions which would put a cautious employer on notice of an increased risk of liability. The employer was aware of Claimant's back, head and neck injuries. The employer was also aware of Claimant's bypass surgery and chest pain. Mr. Grimm testified that Claimant was an excellent employee before the accidents, but had lost weight and was noticeably frail after the surgery. (Tr 235-6).

Finally, Employer must show that Claimant's pre-existing disability contributed to the

permanent total disability such that the employee's disability is not due solely to the workplace injury. *See Pennsylvania Tidewater Dock Co. v. Director, OWCP,* 202 F.3d 656 (3d Cir. 2000). In *Pennsylvania Tidewater Dock Co.*, the Court stated,

> Until now, this Court has never explicitly stated exactly what an employer must demonstrate in order to satisfy this requirement. We hold that an employer may not shift responsibility for a worker's total disability pursuant to §8(f) of the LHWCA unless it can demonstrate that its employee's workplace injury would not have disabled the worker on its own. That is to say, in order to satisfy the requirements for special fund relief that are laid down in 8(f), an employer must demonstrate that its worker would have been able to continue working after his workplace accident if he had not already been suffering from a pre-existing, permanent partial disability.

In this case, Claimant's disabling pain and inability to work were the result of his pre-existing conditions, coupled and exacerbated by his May 9, 1997 work-related injuries. If the claimant had not been suffering from a long standing back condition; shoulder and chest pain; and frailty as a result of his bypass surgery, the May 9, 1997 falls would not have left him totally disabled. The events of May 9, 1997 can be seen as the proverbial "straw that broke the camel's back." The claimant presented a strong working record and had continued to work after his earlier injuries and his bypass surgery. It was not until the falls of May 9, 1997, that he reported that he was in too much pain to continue working.

In view of the above, I find that Claimant had a pre-existing permanent partial disability before the employment injury; the pre-existing partial disability was manifest to the employer prior to the current employment injury; the current permanent total disability was not due solely to the employment injury. Thus, the employer is entitled to Section 8(f) relief.

ORDER

Based upon the foregoing Findings of Fact , Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director:

It is therefore ORDERED that:

1. Employer shall pay to Claimant compensation for his temporary total disability from May 10, 1997 through May 21, 2000, based upon an average weekly wage of $594.00, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on May 22, 2000, and continuing thereafter for 104 weeks, Employer shall pay to Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of

$594.00, such compensation to be computed in accordance with Section 8(a) of the Act.

3. After the cessation of payments by Employer continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act.

4. Employer shall receive credit for all amounts of compensation preciously paid to Claimant as a result of his May 9, 1997 injuries. Employer shall also receive a refund, with appropriate interest, of all overpayments of compensation made to Claimant herein.

5. Interest shall be paid by Employer and the Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing of this Decision and Order with the District Director.

6. Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as Claimant's work-related injury referenced herein may require, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.

7. Counsel for the claimant is granted thirty (30) days in which to file a fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to respond thereto.

A
GERALD M. TIERNEY
Administrative Law Judge